SUPREME COURT, U. S.

FILED

MAR 4 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ TERM, 1976

No. 75-1253

LESTER PERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLE WARREN E. BURGER, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Lester Perry for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case.

I.

OPINIONS DELIVERED IN COURTS BELOW

The United States District Court for the Southern District of West Virginia did not write an opinion. The United States Court of Appeals for the Fourth Circuit rendered a Per Curiam Decision only.

II.

JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is February 3, 1976. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is section 1254 of Title 28 of the United States Code.

III.

QUESTIONS PRESENTED

The questions presented for review are:

(1) Whether the trial Court erred in calling a witness as a Court witness, at the request of the Government, and allowing the Government to use leading questions and to impeach the witness?

(2) Whether the trial Court erred in refusing to reopen the case after the close of the evidence to allow defendant's counsel to impeach the testimony of the Government's rebuttal witness?

(3) Whether the evidence, consisting of the testimony of accomplices with long criminal records and

motives for revenge against defendant, was sufficient to support the verdict?

(4) Whether the trial Court erred in failing to disqualify himself for the purposes of sentencing after learning of threat against his life allegedly made by the defendant?

(5) Whether the Government created prejudicial error by mistaking the evidence in the closing argument to the jury?

(6) Whether the trial Court erred in allowing a witness to testify to his opinion of Petitioner's guilt?

(7) Whether the trial Court erred in allowing testimony prejudicial to the Petitioner to be given?

IV.

STATUTES INVOLVED

The statutes of the United States involved are Sections 2114 and 2 of Title 18 of the United States Code which provide as follows:

2114—Whoever assaults any person having lawful charge, control, or custody of any mail matter or of of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States,

or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

2 (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

V.

STATEMENT OF THE CASE

The Petitioner, Lester Perry, was convicted of a violation of Title 18, United States Code, Sections 2114 and 2 aiding and abetting, by force and violence and against resistence and by putting in fear, in stealing mail matter and money which was the property of the United States in the lawful charge, control and custody of Richard Ellis, consisting of approximately $10,000.00. The trial was held in Huntington, West Virginia before Judge K. K. Hall and a jury on November 25, 1974.

The evidence adduced at the trial indicated the following: That there was a regular postal route established between Logan and Huntington, West Virginia. Richard Ellis, mail truck driver, testified that on February 3, 1969, while stopped at the Salt Rock Post Office, two men took control of the truck at

gunpoint and drove it to an isolated spot. A third man arrived by car and aided in robbing the truck. Richard Ellis further testified that he could not describe the men, but that Lester Perry was not one of them. The Government called an alleged accomplice, Doug Willard. Doug Willard was allowed to testify as a Court witness since the Government refused to vouch for his credibility. The Government was permitted to use leading questions. Throughout Mr. Willard's testimony, the Government frequently used prior statements made by the witness to refresh his recollection when his testimony varied from the statements. Counsel for Lester Perry initially agreed to this procedure if a cautionary instruction would be given to the effect that the Government would not vouch for the credibility of the witness. However, after the instruction was given and prior to the testimony of the witness, this entire procedure was objected to by counsel for Lester Perry. Doug Willard testified that he went to Junior Perry's house in Chapmanville, West Virginia, with Ventrue Mitchell, another alleged accomplice. He further testified that he did not go into the house and only saw Junior Perry standing on his porch. When asked if Junior Perry was present in the Courtroom, Doug Willard stated that he was not. When asked to look closer, he pointed to defendant, Lester Perry, and stated that he looked familiar. Willard was permitted to testify, over objection, that Ventrue Mitchell told him he had an inside source for the mail truck robbery and that this source was Lester Perry. Willard also testified that Mitchell told him Perry was to get $1800.00 out of the money taken. Willard stated he visited Junior Perry's house, after the robbery, to see if he had re-

ceived his share. He was unable to describe the house except that it was a frame house on an incline. He also described details of planning a robbery of a Dr. Bittman's house with Ventrue Mitchell and Lester Perry. His description, including the amount Perry was to receive, was identical to what he gave concerning the mail truck robbery. He also testified that he knew Lester Perry had given information which resulted in an indictment being returned against him for murder. Willard was also permitted to testify, over objection, that Lester Perry had been having relations with Dr. Bittman's wife. Willard, on cross examination, admitted to having been convicted of numerious felonies, including murder.

Ventrue Mitchell testified that the government allowed him to plead guilty to conspiracy and would recommend probation and a fine of $3500.00. Mitchell also testified that he was promised immunity from prosecution for any crimes he had to testify about. He stated that he had talked with Lester Perry at Perry's house about the robbery. He was unable to describe Lester Perry's house. He stated that, at sometime, Lester Perry told him the mail truck schedule. He also stated that he and Willard had followed the truck prior to the robbery and decided on the Salt Rock stop for the robbery. He also testified that he knew Lester Perry had implicated him in the Ezra Butcher murder.

Oval Damron, Prosecuting Attorney of Logan County, testified that Perry gave information on the murder of Ezra Butcher which led to the indictment brought against Doug Willard.

Robert C. Coons, Postal Inspector, stationed in Huntington, West Virginia in December of 1967, stated that on December 7, 1968, Lester Perry informed him of being contacted by a Hodges in August of 1967. He stated that Hodges wanted Perry to give him information on mail truck shipments. He testified that he had Perry play along with Hodges. A dummy run for the mail truck was arranged, but the robbery had been called off. He also was permitted to testify that Lester Perry was cooperative only on the surface. He stated that, even though he had no evidence to the contrary, he had been suspicious of Lester Perry.

Counsel for defendant introduced testimony and exhibits showing that Lester Perry was in Texas when the robbery took place. Counsel for defendant then called six character witnesses to the stand. Each indicated that he thought Lester Perry had a good reputation. On cross-examination, the Government was permitted, over objection, to ask each witness about Perry's gambling, cock-fighting, an arrest in San Antonio, Texas in 1959, on a charge of aggravated assault with a motor vehicle, an arrest in Riverside, California in 1951, on a charge of interferring with an arrest and profane language, an arrest in Lake Charles, Louisiana in 1959, on a charge of simple battery, and an indictment in Logan County, West Virginia in 1973, on a charge of breaking and entering.

Lester Perry was called to testify, but was not permitted to explain away the charges stated during cross-examination of the character witnesses. At this point, at the request of the Government, the Court

gave a cautionary instruction to the jury concerning the use of the charges stated by the Government in cross-examining the character witnesses. On cross-examination, the Government was permitted to question Perry about the details of cockfighting. Counsel for defendant objected to this questioning.

Barbara Cagle was recalled by the Government on Redirect. She testified that in May or June of 1969, she came to West Virginia with Doug Willard. She stated that they went to Salt Rock and he showed her where the robbery took place. She further testified that Willard told her that Perry was involved in the mail truck robbery. This was admitted as a prior consistant statement. This indicated that Willard had implicated Perry in the robbery prior to the time Perry told about the Ezra Butcher murder.

After this testimony, both sides rested. Prior to any further action in the case, counsel for Lester Perry made a motion to reopen the case and recall Barbara Cagle. Counsel stated that Barbara Cagle's grand jury testimoney indicated that Willard had not told her the names of those involved in the robbery. Counsel had not read it when Barbara Cagle was recalled. This motion was denied by the Court.

During the closing argument, the Government was permitted to state, over objection, that Doug Willard had identified Lester Perry.

The jury returned a verdict of guilty. Prior to sentencing, there was an alleged threat made on the life of the Judge of the District Court. This threat had

initially been attributed to the Petitioner, Lester Perry. Perry's counsel moved for the Court to disqualify himself. The Court denied the motion and sentenced Petitioner to imprisonment for twenty-five years. Petitioner appealed to the United States Court of appeals for the Fourth Circuit on December 29, 1974. His conviction was affirmed on February 3, 1976.

The basis for federal jurisdiction in the Court of first instance is Sections 2114 and 2 of Title 18 of the United States Code.

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) The decision of said Court of Appeals as to the propriety of allowing the Government to impeach and use leading questions on its own witness, by holding that counsel for Lester Perry had not made a timely objection and by refusing to hold that the use of said procedure was an abuse of discretion, so far sanctions a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The United States Court of Appeals for the Seventh Circuit has decided, in *Fournier v. United States,* 58 F.2d 3 (7th Cir. 1931), that special reasons must be shown to justify the Court in calling a witness as its own rather than a Government witness, and the fact that the Government did not want to be bound by the testimony of the witness was not a sufficient reason.

The Government was permitted to use leading questions throughout the interrogation of the witness. Also,

the Government was permitted to refresh the memory of the witness when his testimony varied from that he had previously given. At one point in the trial, the Government was permitted to read to the witness, in the presence of the jury, lengthy excerpts from a statement he had previously made. In *Litsinger* v. *United States,* 44 F.2d 45 (7th Cir. 1920) and *United States* v. *Allsup,* 485 F.2d (8th Cir. 1973) the courts held that when the Government uses prior testimony to impeach a court witness, its probative value should be strictly limited to impeachment. These cases also indicate that it is reversible error to introduce the impeachment testimony into evidence without an instruction strictly limiting it to impeachment. While such testimony was not placed into evidence in the present case, the Government was permitted to read at length from a statement used to impeach the witness. The entire statement contained numerous assertions which did not impeach the testimony of the witness. By permitting the Government to use these procedures, the statement was given the force and effect of properly admitted evidence. Therefore, the decision of the District Court affirmed by the Court of Appeals was probably in conflict with the decisions cited above and calls for the exercise of this Court's power of supervision.

(2) The decision of the Court of Appeals affirming the District Court's ruling that the defendant could not reopen the case after the close of the evidence under the circumstances of this case amounted to an abuse of discretion and denial of the defendant a fair trial. This Court has stated that refusal to reopen to receive further proof may constitute reversible error,

Unied States v. *Bayer,* 331 U.S. 532 (1947). In the present case, the Government recalled a Barbara Cagle as a rebuttal witness to testify to a prior consistent statement made by the defendant's alleged accomplice, Doug Willard. She testified that Doug Willard had implicated the defendant in the robbery prior to the time he had had a motive for revenge against the Defendant. Then both sides retired. Before any other action in the case, Defense Counsel requested the trial court to reopen so he could impeach the testimony of Barbara Cagle through her grand jury testimony. Defense Counsel had not been furnished the grand jury testimony until after she had testified on direct in the Government's case in chief. At that time her testimony was not relevant to this Defendant. (Defendant was jointly tried with another alleged accomplice, Don Chambers). Defendant's lack of diligence in discovering the impeachment evidence was contributed to by the Government's delay in producing the materials and the use of the witness on rebuttal. The impeachment testimony would have strengthened the Defendant's case greatly. Refusal to reopen under these circumstances constituted an abuse of discretion and calls for the exercise of this court's power of supervision.

(3) Petitioner contends there is not substantial evidence to support the verdict. This Court has stated that it has never hesitated to examine a record to determine whether there was any important and substantial evidence fairly tending to support the verdict. *Mortensen* v. *United States,* 322 U.S. 369 (1944); *Abrams* v. *United States,* 250 U.S. 616 (1919). In the present case, the Government relied solely on

the testimony of two accomplices, Doug Willard and Ventrue Mitchell, to implicate the Defendant in the robbery. Doug Willard testified that Ventrue Mitchtold him Lester Perry was the inside source for the robbery. This testimony was probably inadmissable as a violation of Appelant's right to cross-examination. *Bruton v. United States*, 391 U.S. 123 (1968). However, Ventrue Mitchell was later called to testify. He was the only person involved in the conspiracy who testified that he directly dealt with the Defendant in the planning of the robbery. His testimony was weakened by the fact that he had been given immunity to testify and had been allowed to plead guilty to conspiracy with a recommendation for probation. He also testified that he knew the Defendant had given information against him concerning a murder. Also, Ventrue Mitchell testified that he had followed the mail truck on its route prior to the robbery. He thereby acquired for himself the same information the Defendant was alleged to be paid for giving. Petitioner contends that under these facts, the evidence was not sufficient to sustain the verdict.

(4) The decision of the Court of Appeals as to the propriety of the trial judge refusing to disqualify himself for the purposes of sentencing after learning of threat on his life allegedly made by the Defendant, so far sanctions a departure from the accepted and usual course of judicial proceedings as to call for this court's power of supervision.

Even though the twenty-five year sentence is mandatory under Title 18 U.S.C. §2114, the trial court could have suspended the sentence and placed the De-

fendant on probation, *Andrews* v. *United States,* 373 U.S. 334 (1963), or shortened the time for the prisoner's eligibility for parole, *Jones* v. *United States,* 417 F.2d 593 (8th Cir. 1969). These constitute areas of discretion which the trial court could have considered during sentencing. Because these areas of discretion exist, the mid court should have disqualified himself from the sentencing and failure to do so was an abuse of discretion to the substantial prejudice of the Defendant.

(5) The decision of the Court of Appeals, affirming the District Court, holding that there was no error when the Government was permitted to state on closing argument that Doug Willard had identified the Defendant, so far departs from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision. In *Berger* v. *United States,* 295 U.S. 78 (1935), this Court held that a prosecuting attorney may strike hard blows but not foul ones. This Court went on to hold that the case against the defendant was weak because it depended on the testimony of an accomplice with a long criminal record. Since the case was weak, prejudice to the accused was highly probable. Petitioner contends that the decision of the Court of Appeals was in conflict with the above-civil case as well as other applicable decisions of the Court.

(6) The decision of said Court of Appeals concerning the admission of prejudicial material by holding that the admission of testimony of adultry, cockfighting and the opinion of a witness concerning defendant's guilt was not prejudiced is in conflict with ap-

plicable decisions of other Circuit Courts. It is inconsistent with traditional concepts of a fair trial to permit the introduction of any evidence which might influence the jury to convict the Defendant for any reason other than his guilt of the specific offense with which he is charged. *United States* v. *Harris,* 331 F.2d 185 (4th Cir. 1964). To admit proof of other crimes, in no way connected with the one with which the accused is charged, would influence the jury into believing that these other crimes were the basis for the commission of the crime charged. *Hargett* v. *United States,* 183 F.2d 859 (5th Cir. 1951). Also, by receiving inadmissible, irrelevant and highly prejudicial testimony, the court permitted the Government to paint the defendant as a bad man and is reversible error. *United States* v. *Tomsiolo,* 249 F.2d 683 (2nd Cir. 1957). Such inflamatory and prejudicial material draws the jury's attention away from the issues it has been called to resolve, *United Mine Workers* v. *Patton,* 211 F.2d 742 (4th Cir., 1954) *cert. don.* 348 U.S. 824 (1954). Some evidence, even if it bears some logical relevance to the case, may be excluded where its probative value is substantially outweighed by danger of unfair prejudice. *United States* v. *Brown,* 490 F.2d 758 (D.C. Cir. 1973). Petitioner contends that the evidence of adultry and cockfighting had little or no probative value and was highly prejudicial. Also, the testimony of Inspector Coons that the Defendant was cooperative with the postal authorities only on the surface was mostly speculation and opinion not based on any facts which the witness could relate to the jury. Petitioner contends that this tesimony was likewise prejudicial and inadmissible.

VII.

CONCLUSION

WHEREFORE, Lester Perry, Petitioner, prays that a Writ of Certiorai issue to review the judgment of the United States Court of Appeals for the Fourh Circuit in the above-entitled case.

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E. DENNIS WHITE, JR.

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BERNARD T. NIBERT, II

Counsel for Petitioner.

APPENDIX TO BRIEF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

UNITED STATES OF AMERICA

vs. Criminal Action No. 74-9-H

LESTER PERRY

ORDER

This case came on for trial before the Court and a jury on November 25, 26, 27, and 29, 1974, the defendant, Lester Perry, appearing in person and by William A. Beckett, his counsel, and Robert B. King and Raymond L. Hampton, II, Assistant United States Attorney's appearing for the Government.

The defendant having entered a plea of NOT GUILTY to the within indictment, and the jury having on this 29th day of November, 1974, returned its verdict as follows:

"We, the jury, find the defendant, Lester Perry, *Guilty* as charged in the indictment in this action.
29 NOVEMBER, 1974 (Date)
/s/ CONRAD KEITH RATCLIFF (Foreman)"

and the jury having been polled at the direction of the Court, IT IS ADJUDGED that the defendant, Lester Perry, is guilty as charged in the within indictment and he stands convicted of the offense of violation of Title 18, United States Code, Sections 2114 and 2.

And the Court not now being advised as to its disposition of this case, IT IS ORDERED that the Pro-

bation Department of this Court make a presentence investigation of the defendant and report to the Court thereon, and that the said defendant appear before this Court at Huntington on the 9th day of January, 1975, at 9:30 a.m. to answer of and concerning such disposition or sentence as may be pronounced against him.

Thereupon, the Court advised the defendant that he has seven (7) days from this date to file post-trial motions.

IT IS ORDERED that the bond heretofore executed by the defendant be rescinded and the defendant be released provided that he will execute a bond binding himself to pay the United States of America the sum of FIFTY THOUSAND DOLLARS ($50,000.-00). either secured by the undertakings of sufficient solvent sureties or by the deposit of an equal amount of cash or other security in lieu thereof for his appearance before the Court on January 9, 1975, at 9:30 a.m. at Huntington, West Virginia, or at any other time the Court directs, with special provisions of said bond as follows:

1. That the defendant not contact any witnesses in this case either directly or indirectly other than through his attorney.

2. That the defendant not violate any laws.

3. That the defendant shall keep the Clerk and his attorney informed as to his whereabouts, his residence, and his telephone number at all times.

The defendant is hereby remanded to the custody of the United States Marshal in lieu of executing bond, and this case is accordingly continued.

ENTER: November 29, 1974
K. K. HALL
United States District Judge

A TRUE COPY certified this
3rd day of December, 1974
JAMES A. McWHORTER, Clerk
By WILDA STOMSTREET, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

vs. Criminal Action No. 74-9-H

LESTER PERRY

ORDER

On the 27th day of December, 1974, came the United States of America by Robert B. King, Assistant United States Attorney, and came also the defendant, Lester Perry, in person, and by William A. Beckett, his counsel.

The Court has considered all the reasons given in the defendant's motion for a new trial and finds there is no error,

THEREFORE, IT IS ORDERED that defendant's motion for a new trial be, and the same is hereby, denied.

Thereupon, the defendant by counsel moved that this Court be disqualified to sentence the defendant because an alleged threat was made against the life of the Court, and the Government objected to the Court being disqualified on the basis of the alleged threat; and the Court is of the opinion that to disqualify this Court would set an extremely bad precedent.

THEREFORE, IT IS ORDERED that defendant's motion that this Court be disqualified to sentence the defendant be, and the same is hereby, denied.

The defendant having been convicted of the offenses of violation of Title 18, United States Code, Sections 2114 and 2 as charged in the one-count indictment herein, and the Court this day having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary was shown or appeared to the Court.

IT IS ADJUDGED that the defendant, Lester Perry, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of TWENTY-FIVE (25) YEARS. The Court recommends that the defendant be transported as soon as possible to the institution where he will be confined.

Thereupon, the Court personally advised the defendant that he has ten (10) days from this date to appeal this action, of his right to an appeal in forma pauperis as well as his right to have counsel appointed to represent him should he be financially unable to employ an attorney.

IT IS ORDERED that no costs be recovered of the said defendant and that the defendant be given credit for time spent in federal custody in connection with the charges in the within indictment.

IT IS FURTHER ORDERED that the bond heretofore set by the Court and unexecuted by the defendant be, and the same is hereby, revoked and that the defendant not be released on bond pending appeal.

And the defendant having indicated a desire to appeal the conviction and sentence herein, IT IS ORDERED that Dennis White be, and he is hereby, appointed as counsel for the defendant for such appeal, and the defendant is directed to pay any part of such attorney's fees as he can.

The Clerk is directed to send certified copies of this order to the United States Attorney, William A. Beckett, Esq., Dennis White, Esq., the Probation Department, and three certified copies to the United States Marshal.

Three certified copies of this judgment delivered to the United States Marshal shall serve as the commitment herein, and the defendant is hereby remanded to the custody of the United States Marshal.

And, whereas, this case is pending on the Huntington docket, the Clerk is directed to enter this order of record at that point.

ENTER: December 27, 1974
K. K. HALL
United States District Judge

A TRUE COPY, certified this
3rd day of December, 1974.
JAMES A. McWHORTER, Clerk
By RAY D. SOMMERVILLE, Deputy

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v. Criminal No. 74-9-H

EDWARD SMALLEY, DONALD JOSEPH CHAMBERS, LESTER PERRY and VENTRUE MITCHELL,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that the defendant, Lester Perry, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order entered in this action on the 27th day of December, 1974, adjudging said defendant guilty and committing him

to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty-five (25) years.

Dated: December 29, 1974.

BECKETT, BURFORD & JAMES
418 Eighth Street
Huntington, West Virginia
Counsel for the Defendant,

LESTER PERRY

A TRUE COPY, certified this
30th day of December, 1974
JAMES A. McWHORTER, Clerk
By RAY D. SOMMERVILLE, *Deputy*

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1153

UNITED STATES OF AMERICA,

Appellee,

vs.

DONALD JOSEPH CHAMBERS,

Appellant.

No. 75-1154

UNITED STATES OF AMERICA,

Appellee,

vs.

LESTER PERRY,

Appellant.

Appeals from the United States District Court for the Southern District of West Virginia, at Huntington. K. K. HALL, *District Judge.*

(Argued January 5, 1976 Decided Feb. 3, 1976)

Before WINTER, CRAVEN and BUTZNER, *Circuit Judges.*

E. Dennis White, Jr. [Court-appointed counsel] for Appellant in No. 75-1154; Robert G. Wolpert [Court-appointed counsel] for Appellant in No. 75-1153; John A. Field, III, United States Attorney (Ray L. Hampton, II, Assistant United States Attorney, on brief) for Appellee in Nos. 75-1153 and 75-1154.

PER CURIAM:

In these two consolidated appeals Lester Perry and Donald Chambers attack their convictions of armed

robbery of a mail truck and its contract driver in violation of 18 U.S.C. §2114. The cases are wholly different and require separate consideration.

We hold that the evidence against Chambers was insufficient to have been submitted to the jury and does not suffice to support the verdict. Chambers was never identified as a participant in the robbery nor was there circumstantial evidence sufficient to support a verdict of guilt beyond a reasonable doubt.

The evidence against Perry was amply sufficient. The jury could well have found beyond a reasonable doubt that Perry in his capacity as Postmaster actually planned the robbery and informed the robbers of the route that would be taken by the truck and when it would contain money.

Perry complains of the court calling a prosecuting witness as its own because the government was not willing to vouch for his credibility. Ordinarily whether to call a witness is in the court's discretion. *United States* v. *Allsup*, 405 F.2d 287 (8th Cir. 1973). We need not consider whether the court here abused its discretion for the record is clear that the defendants made no timely objection and initally agreed that they did not object to such a procedure so long as the court instructed the jury that the witness was called by the court because the government would not vouch for his credibility. That was done.

We also find no abuse of the court's discretion in its failure and refusal to permit reopening the case to permit further cross-examination and impeachment

of a prosecution witness. Perry's other assignments of error have been considered and are found to be without merit.

The conviction of Donald Chambers will be reversed.

The conviction of Lester Perry will be affirmed.

No. 75-1154 *AFFIRMED.*

No. 75-1153 *REVERSED.*